STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
RUBIN J. PITARKA AND USCANA CONSTRUCTION CORP.,	:	
Petitioners,	:	DOCKET NO. PR 19-060
To Review Under Section 101 of the Labor Law: An Order to Comply with Articles 6 and 19 of the Labor Law, dated February 26, 2019,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Rubin J. Pitarka, petitioner pro se.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Joan K. Harris* of counsel), for respondent.

WITNESSES

Rubin Pitarka, Michal Koniecko, Alfred Domgjoni, Elvis Milo for petitioners.

Jaime Narvaez, Senior Labor Standards Investigator Emelina Garcia, for respondent.

WHEREAS:

On April 30, 2019, petitioner Rubin Pitarka (hereinafter "Pitarka") on behalf of himself and Uscana Construction Corp. (hereinafter "Uscana") filed a petition for review of an order issued against them by respondent Commissioner of Labor (hereinafter "Commissioner" or "DOL") on February 26, 2019. Respondent answered the petition on September 13, 2019.

Upon notice to the parties, a hearing was held on December 12, 2019 in Garden City, New York, before Administrative Law Judge Jean Grumet, the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to file post-hearing briefs.

The order to comply with Articles 6 and 19 of the Labor Law (hereinafter "order") directs compliance with Article 19 and payment to respondent for minimum wages in the amount of $1,718.75 to Nefi Caballon Naraci (hereinafter "Caballon") for the period November 30, 2017 to May 14, 2018; interest at 16% computed through the date of the order in the amount of $216.99; 100% liquidated damages in the amount of $1,718.75; and a civil penalty of $859.38. The order also directs compliance with Articles 6 and 19 and payment for unpaid wages for the following five claimants: $2,000.00 to Caballon for the period November 30, 2017 to May 14, 2018; $2,464.00 to Jaime Narvaez (hereinafter "Narvaez") for the period April 30, 2018 to May 14, 2018; $2,800.00 to Victor Orosco Zhinin (hereinafter "Orosco") for the period April 30, 2018 to May 11, 2018; $1,760.00 to Orlin Rodas (hereinafter "Rodas') for the period April 30, 2018 to May 11, 2018; and $2,400.00 to Manuel Tacuri (hereinafter "Tacuri") for the period April 30, 2018 to May 17, 2018, for a total of $11,424.00 in unpaid wages; interest at 16% computed through the date of the order in the amount of $1,445.08; 100% liquidated damages in the amount of $11,424.00, and a 50% civil penalty in the amount of $5,712.00. The order also imposes a civil penalty of $500.00 for a violation of Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 142-2.6 for failing to keep and/or furnish true and accurate payroll records for each employee for the period of May 6, 2018 through May 20, 2018. The total amount due under the order is $35,018.95.

The petition alleges that the orders are invalid and unreasonable because the number of claimed hours is incorrect. Petitioners also contested the civil penalties and liquidated damages in the order. During the hearing, the parties entered into a written stipulation stating that the amount of wages owed to claimants Narvaez and Tacuri "are as set forth in the order," leaving the order's underpayment findings in dispute only with respect to Caballon, Orosco and Rodas.[1]

Petitioners' Evidence

Testimony of Petitioner Rubin Pitarka

Pitarka testified that he was the president and sole owner of Uscana, a construction subcontractor that performed concrete foundation work.

Pitarka testified that Uscana operated from July 2017 to May 2018 and employed 60 to 80 workers. Uscana had two main jobs. Pitarka assigned superintendents at the two worksites, and a "payroll accountant" in Uscana's office, to obtain, review and process summary timesheets discussed below and prepare payroll. According to Pitarka, employees were correctly paid their hourly wage until mid-May 2018 when Uscana had to permanently close because it did not receive its expected biweekly payment from the general contractor for whom it had just completed both jobs, leaving Uscana without money to pay wages for the last payroll period. Pitarka testified that he "never had the funds to pay some of the workers for the last two weeks," and his efforts over the next four months to find other jobs for Uscana failed.

Uscana paid employees based on timesheets that summarized daily sign-in sheets kept by superintendents at each worksite. Screenshots of the summary timesheets were emailed from the sites to Uscana's office for preparation of payroll. Mike Koniecko (hereinafter "Koniecko"), an assistant superintendent, was in charge of timekeeping at one worksite until he left Uscana in its

[1] The stipulation concerning Narvaez and Tacuri was limited solely to the amount of wages owed and did not include any liquidated damages, civil penalties or other assessments awarded in the order to comply.

final days and assistant superintendent Sul Hykaj (hereinafter "Hykaj") took over that record-keeping. Project manager Alfred Domgjoni (hereinafter "Domgjoni") was the liaison between the field and the office, responsible to ensure records for both sites were filled out correctly and submitted on time. Elvis Milo (hereinafter "Milo"), an office assistant, checked for discrepancies or mistakes. Another office employee, Debbie Farrell (hereinafter "Farrell"), generated paychecks and paystubs using hours listed in timesheets and the QuickBooks computer program. Asked on cross-examination whether petitioners based their contention that respondent's monetary claim was too high only on summary time sheets, as distinct from "sign-in, sign-out sheets," Pitarka testified: "That is correct, because I always considered… the time sheets as correct representation of the actual sign-in sheets." Those underlying "sign-in sheets were looked at only if there were discrepancies." Pitarka testified, however, that "there are always discrepancies," and later in the hearing, that "a lot of times, yes, I had to step in… and resolve the issue." All Uscana records remain in Pitarka's possession, although he did not supply them to DOL or bring them to the hearing. He testified that "when the office closed, I took everything that belongs to the office there at my own home. I didn't think they were needed."

Pitarka testified that when the DOL contacted him to say that some Uscana workers were owed wages he checked his records to verify that their claims were correct, and paid several in full, including a brother of Tacuri named Jose or Muñoz (hereinafter "Muñoz Tacuri"), and a foreman named Manuel Orosco. Pitarka also "started going" to Farrell, the office employee "who did all the payroll, and she had all the records," but while he collected whatever records he could, "it was not enough information to make a formal submission" to DOL.[2] Although Pitarka paid Muñoz Tacuri and Manuel Orosco after verifying their claims, he noticed right away that at least one claim raised by respondent, for Caballon, was not correct. Caballon claimed underpaid overtime beginning in November 2017 — specifically, that he did not receive a $12.50 per hour overtime premium for 5.5 hours a week for 25 weeks, a total of 137.5 hours — yet Pitarka knew that all Uscana employees, including Caballon, worked and were paid the required premium rate for overtime each week, including almost every Saturday and one or two extra hours many weekdays. According to Pitarka, Caballon once complained about unpaid overtime and "my understanding was that he was going to get paid the next payment cycle," but that was for a brief time, not for an extended period starting in November.

Pitarka offered in evidence records summarized in a later section to support his contention concerning Caballon's overtime. He also pointed to a "discrepancy" in respondent's claim for wages owed to Orosco and Rodas, namely, that while they claimed to have worked 40 hours in each of the two May 2018 weeks for which they were not paid, their last work week actually included only two days and 16 hours. Petitioners offered in evidence a "Corrected Schedule of Wages" prepared by Pitarka, which states that according to petitioners, Caballon was owed $350.00 (rather than the $1,718.75 stated in the order) in unpaid overtime and $2,000.00 (the same amount stated in the order) in unpaid wages, Orosco was owed $1,960.00 (rather than the $2,800.00 stated in the order) in unpaid wages, and Rodas was owed $1,232.00 (rather than the $1,760.00 stated in the order) in unpaid wages, for a total of $5,542.00 in wages (rather than the

[2] Pitarka later stated he did not believe he had to supply records "since I took care of his [apparently, Muñoz Tacuri's] payment," but on further examination, agreed he was again asked for records after paying Muñoz Tacuri, because Tacuri had also filed a complaint. He testified he did not supply records because Farrell had so far given him only records pertaining to Caballon "and I wanted to have all of them."

total $8,278.75 listed in the order) underpaid to these three workers.[3] According to petitioners, Caballon worked 28 overtime hours (not 137.5) without an overtime premium, and during the week ending May 13, 2018, Victor Orosco and Rodas worked 16 hours, not 40 as respondent claimed. The total difference between the order's and petitioners' calculation of wages owed is $2,736.75.

According to Pitarka, when Uscana closed its office in June or July 2018 he placed all paperwork in commercial storage; then, upon recognizing in August or September that Uscana would never reopen, took "twenty-some boxes of documents" to his house, but did not know exactly what was in them. Besides payroll-related records, the boxes held Uscana's tax, banking and job records. Time records offered in evidence came from either the boxes in Pitarka's house, or from emails he had collected. Asked if he had the "sign-in, sign-out sheets" on which summary timesheets were based, Pitarka testified: "I believe I have them…. I believe they're all together." He stated that if proof of actual payment to employees such as canceled checks was needed, "I'm pretty sure I can get them from the bank."

Pitarka testified that he told respondent's investigator Emelina Garcia in conversations from Thanksgiving through the end of 2018 that he was going through the records. However, he never asked Garcia what specific records were needed to comply with her records requests because "the conversation was can you pay these guys. I mean, that was the whole conversation. And I paid whatever I could, and I couldn't pay everybody." He believed that they were supposed to have one more conversation to talk about a possible settlement and he was under the impression that he was going to get another phone call. Instead, the February 26, 2019 order was issued.

Testimony of Michal Koniecko

Koniecko worked for Uscana as a foreman with duties including preparing, supervising and collecting daily records of employees' arrival and departure times. Koniecko offered in evidence summary timesheets for ten weeks between December 2017 and April 2018, which he testified he prepared. These timesheets include a row for each employee and three columns per day, headed, for example, "Monday In," "Monday Out," and "Monday Tot." The timesheets offered in evidence include entries for specific employees handwritten by Koniecko: for example, "Monday In" "7:30," "Monday Out" "4:00," and "Monday Tot" "8.5." Nearly without exception, all employees' entries for a given day are identical. Koniecko testified he made this type of summary timesheet within two weeks of work's performance, using sign-in sheets (referred to by Koniecko as "single-day time sheet logs") employees themselves signed at the job site. Koniecko initially kept the records there in case a worker complained of not having been paid for all hours worked. Koniecko testified that employees signed these sheets on entering and leaving the job site, and "That's how we verified somebody showing up." Koniecko, who, as "the field guy," did not visit Uscana's office, emailed the office screen shots of the summary timesheets he prepared from the sign-in sheets, with a copy to project manager Alfred Domgjoni, for use in preparing Uscana's payroll. Since the worksites lacked room or security for voluminous records, Koniecko also gave a driver the timesheets — and, by the end of a job, the sign-in sheets as well — for delivery to Uscana's office.

[3] Petitioners' "Corrected Schedule of Wages" also included $2,464.00 (the same amount stated in the order) underpaid to Narvaez. As already stated, petitioners stipulated that the order's underpayment findings with respect to Narvaez and Tacuri are correct.

Testimony of Alfred Domgjoni

Domgjoni worked for Uscana as a project manager, "the link between the field and the office administration." According to Domgjoni, employees at the worksites entered their daily arrival and departure times on sign-in sheets and "at the end of the week, Mikey [Koniecko] and myself… would summarize this into one summary time sheet that would be sent to the office, to Debbie [Farrell]." Koniecko or Domgjoni emailed Farrell screen shots of the timesheets after reviewing with employees any questions, for example, because an employee might have forgotten to enter a starting or departure time. Sign-in sheets were initially stored at the work site so that if an employee questioned his pay, Domgjoni could check to make sure there had been no mistake in transcribing hours to the summary timesheet; Domgjoni does not know what happened to the sign-in sheets after that. According to Domgjoni, the reason many employees were recorded as arriving at exactly the same time, for example 7:30 a.m., is that Domgjoni didn't want to cheat anyone who had been waiting in line to sign in. The work day's duration varied but since Uscana operated every Saturday, eight hours' weekly overtime because of Saturday work was "the minimum," with another six or seven hours' weekly overtime common. Because bad weather could result in a need to complete concrete work the next day, "you can see very easily twelve to twenty to thirty hours' overtime" in a week.

Koniecko and Domgjoni worked to resolve any employee complaints about pay, making sure they listened to the employees. All worker complaints "up to when things started to get tight in the spring of 2018" were successfully resolved. Caballon complained in March or April 2018 about how much he was paid for overtime; Domgjoni does not remember an earlier complaint or a complaint of underpayment dating to 2017. "I can check it out but I think it's for March of 2018 only…. [A]nything prior to that, I'm shocked to hear that anybody would have an issue that was not taken care of." By the spring of 2018, Uscana still had about fifty employees but its work force was thinning as both jobs neared completion with much smaller crews needed for remaining work. All employees, including Domgjoni himself, wanted to know what the next project would be. Asked whether any claimant asked why wages were not paid, Domgjoni testified: "the questions I will get is more like where is the next job." By the time workers missed payment for their last work and began complaining directly to the office, some had already left because they did not see other projects coming. Domgjoni offered in evidence the timesheet for the week ending May 13, 2018, which in Koniecko's absence, was prepared by Hykaj and reviewed by Domgjoni, and which lists Orosco and Rodas as having signed in for 8.5 hours on each of two days, for a recorded total of 17 work hours.[4]

Testimony of Elvis Milo

Elvis Milo (hereinafter "Milo") worked in Uscana's office, sometimes including helping Farrell, "our payroll lady," to prepare payroll. Milo did this by entering employees' hourly pay rates and hours listed in the summary timesheets in an Excel spreadsheet, from which Farrell later used QuickBooks to generate checks. Employees with complaints about pay would go to "the job site guys," who would email Farrell. Milo recalls Farrell saying she was correcting mistakes in worker payment by putting underpaid money in a subsequent paycheck. Milo does not recall whether he ever saw sign-in sheets other than the summary timesheets. His understanding was that

[4] The timesheet lists Tacuri as having signed in for 8.5 hours three days that week, and does not show Caballon or Narvaez signed in. As stated below, Elvis Milo testified he thinks hours recorded include a lunch break.

Farrell, when preparing payroll, took a worker's hours for a week from the timesheets without entering each particular day's total. Milo thinks the total hours shown for a day in the timesheets included the employee's lunch break.

Petitioners' Additional Documentary Evidence

Pitarka offered in evidence what he stated were copies of the stubs of checks Caballon received, and a summary Pitarka prepared of data from these stubs. Specifically, Pitarka offered in evidence stubs of thirteen checks to Caballon, for weeks ending December 17 and December 24 in 2017, and January 14 , 21, 28, February 4, 11, 18, March 4, 18, 25, April 1 and 8 in 2018 — the same weeks for which Koniecko had offered timesheets, except that the latter omit the three weeks in March 2018. As reflected in a summary Pitarka prepared, these thirteen stubs listed a total of 69.5 overtime hours of which only 28 (19.5 the week ending March 18 and 8.5 the week ending March 25, 2018) were not listed as having been paid with an overtime premium. With respect to Caballon's work hours, the thirteen stubs are consistent with the ten timesheets. Petitioners argue based on these records that Caballon was owed only $350.00 in unpaid overtime premiums for 28 hours, not $1,718.75 for 137.5 hours as reflected in the order issued by respondent. Pitarka also offered in evidence what he stated were computer-generated stubs of checks to Orosco and Rodas for the week ending May 13, 2018, each showing 16 rather than 40 hours worked. Pitarka testified that while checks were not actually paid that week since Uscana had no funds, checks were cut and ready to go in accordance with company practice in which contractor payments typically came at the last moment.

Respondent's Evidence

Testimony of Claimant Jaime Narvaez

Narvaez worked for Uscana as a carpenter. There was a form at work on which he wrote "the time that I arrived, my name, and the time that I left…. The signature and the time." Narvaez then gave this form to Koniecko.[5]

Testimony of Senior Labor Standards Investigator Emelina Garcia

Senior Labor Standards Investigator Emelina Garcia (hereinafter "Garcia") testified based on her recollection and records of DOL's investigation which she offered in evidence. Tacuri signed a claim for unpaid wages form on August 27, 2018; Narvaez, Orosco and Rodas did so on September 10, 2018; and Caballon did so on September 11, 2018. Tacuri's claim alleged that he was not paid for 80 hours of work performed from April 30 through May 17, 2018. Narvaez' claim alleged that he was not paid for 88 hours of work performed from April 30 through May 14, 2018. Orosco's claim alleged that he was not paid for 80 hours of work performed from April 30 through May 11, 2018. Rodas' claim alleged that he was not paid for 80 hours of work performed from April 30 through May 11, 2018. Caballon filed two claim forms, the first of which, a claim for unpaid wages, alleged he was a laborer paid $25.00 per hour and was not paid for 80 hours of work performed from April 30 through May 14, 2018. Caballon's second claim, a minimum wage/overtime complaint, alleged that from November 1, 2017 through May 14, 2018, he worked

[5] Apart from identifying the claim for unpaid wages he filed with respondent, Narvaez did not testify further in light of petitioners' stipulation that the underpayment amounts the order claimed for him and Tacuri were correct. Though present at the hearing, Tacuri was also not called as a witness in light of the stipulation.

Monday to Friday from 7:30 a.m. to 4:00 p.m. and Saturday from 9:00 a.m. to 3:00 p.m. with a 30-minute meal break each day — 45.5 work hours per week — but "O.T. worked [was] paid at straight time." Caballon submitted to DOL a copy of his pay stub for the week ending March 18, 2018 which showed 59.5 hours worked, all paid at Caballon's regular $25.00 per hour rate, although the stub also shows a "YTD Amount" of $1,156.25 (at a $37.50 per hour overtime rate, 41.5 hours) in overtime pay.

Garcia testified that on October 29, 2018, Pitarka called her and acknowledged that wages were due and, according to Garcia's testimony, "that he would try to obtain some documentation to show me what was due because he didn't — he didn't think that all of the wages were due…. So I urged him to get me documents and to forward payments of the wages that he did acknowledge." Having received nothing further, on November 15, 2018 Garcia wrote to petitioners stating and detailing the then active claims for unpaid wages of Tacuri, Caballon, Narvaez, Manuel Orosco, Orosco and Rodas; stating that if the claims were not valid, records to disprove them including "payroll records of hours worked and wages paid, or canceled checks" should be sent before November 29, 2018; and advising that "If you do not respond with payment or the requested information, we will issue an Order… without further notice."

Garcia testified that Pitarka called her in response on November 27, 2018 and again acknowledged that he owed some wages. Garcia again "requested time records, evidence of payment, cancelled checks" if he was disputing amounts respondent claimed, explaining at length, as in all her conversations with employers who dispute the validity of claims, what is needed to establish such a case. Pitarka did not, however, provide any of the documents Garcia described, nor did he contact Garcia to clarify or request more information about what she was asking for. After the November 27th call, she did not hear or receive anything from Pitarka again until March 1, 2019 when he called her to discuss a possible settlement.

On December 21, 2018, Garcia referred the case to her supervisor for issuance of an order to comply, because "I had not heard back from Mr. Pitarka and I had not received any payment for at least the acknowledged wages." Garcia also testified: "We cannot hold cases forever, indefinitely, waiting on a payment or records. If there's no response, no cooperation from the employer, our supervisor requests us to move the case forward." Her referral noted that besides failing to pay wages due, Pitarka also "failed to provide time and payroll records" and that even after he requested and obtained an extension to December 13, 2018 of his time to provide records, "no further communication, documentation or payment has been received." Based on the employer's size, good faith, and the gravity of violations, Garcia recommended a 50% civil penalty, 100% liquidated damages and a $500.00 penalty for failure to furnish records, in addition to requiring payment of wages due. On February 26, 2019 respondent issued the order which petitioners have appealed in the present proceeding.

On cross-examination by Pitarka, Garcia agreed that he eventually paid some workers who filed claims with DOL but were later dropped from respondent's investigation — that is, Muñoz Tacuri and Manuel Orosco — since "[i]f they are no longer in the order, they were taken off because they confirmed payment." Garcia denied telling Pitarka in their November 27, 2018 conversation that she was going on vacation but would get back to him as soon as she returned. She testified that DOL findings about amounts owed to Rodas, Orosco and Caballon were based on their claim forms, since "ultimately, the employer must provide the records to refute the claim" and petitioners did not do that.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the Board Rules of Procedure and Practice ("Board Rules") (12 NYCRR) § 65.39.

Standard of Review and Burden of Proof

Petitioners' burden of proof in this matter was to establish by a preponderance of the evidence that the order issued by the Commissioner is invalid or unreasonable (State Administrative Procedure Act § 306; Labor Law §§ 101, 103; Board Rules [12 NYCRR] § 66.30; *Matter of Garcia v Heady*, 46 AD3d 1088, 1090 [3d Dept 2007]; *Matter of Angello v National Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]; *Matter of RAM Hotels, Inc.(T/A Rodeway Inn)*, Docket No. PR 08-078, at p. 24 [Oct. 11, 2011]). A petition must state "in what respects 'the order on review' is claimed to be invalid or unreasonable," and any objections not raised shall be deemed waived (Labor Law § 101 [2]). The Labor Law provides that an order of the commissioner shall be presumed valid (*id.* § 103 [1]). The hearing before the Board is *de novo* (Board Rules [12 NYCRR] § 66.1 [c]).

Applicable Law

Labor Law Article 19 and 12 NYCRR 142-2.2 require employers to pay employees overtime for hours beyond 40 in a work week at a wage rate of one and one-half times the employee's regular rate as prescribed in the federal Fair Labor Standards Act (FLSA). Labor Law Article 6 requires that employers pay employees their full earned and promised wages: in the case of manual workers such as the claimants, "not later than seven calendar days after the end of the week in which the wages are earned." (Labor Law § 191 [1] [a])

Petitioners Undisputedly Failed to Comply with the Law's Wage Payment Provisions

It is undisputed that petitioners failed to comply with the wage payment provisions of Labor Law § 191 (1) (a) and Department of Labor Regulations (12 NYCRR) § 142-2.2. Pitarka testified that he failed to pay some workers, petitioners stipulated that the amounts of underpayment found by respondent for two claimants, Tacuri and Narvaez, were correct, and they acknowledged underpayment to the other three claimants as well. The "Corrected Schedule of Wages" included in Pitarka's letter offered in evidence by petitioners states that the only corrections to the underpayment amounts found in the order are with respect to Caballon's overtime claim and Orosco's and Rodas' final week of work. The reductions in those three claimants' underpayment amounts advocated by petitioners would not exonerate petitioners, only reduce the total underpayment found, from a total of $13,142.75 for the five claimants to $10,406.00.[6]

Petitioners argued at the hearing that the order was "unreasonable because it didn't take into consideration… the circumstances under which this company did what it did." Pitarka stated that "nothing was done purposely. It's not like I didn't pay the workers because I didn't want to pay." However, the Labor Law's wage payment requirements have no exception for inability to

[6] As stated earlier, at the hearing petitioners stipulated that Narvaez and Tacuri were underpaid by a total of $4,864.00, and agreed that Caballon, Orosco and Rodas were underpaid by a total of $5,542.00.

pay, nor is their enforcement limited to purposeful violators or those who did not want to pay. On the contrary, as the Board stated in *Matter of Jason Ellis and Cakes by Jay, Inc.*, Docket No. PR 11-245, at p. 3 (Jan. 30, 2012), "lack of adequate funds does not excuse a failure to comply with the law." While it is understandable that Pitarka hoped his business would somehow survive and was disappointed when it did not, that does not excuse continuing to have employees work without an ability to pay them earned and promised wages.

Petitioners Failed to Furnish Required Records and the $500 Penalty Is Affirmed

Articles 6 and 19 of the Labor Law require employers to maintain for at least six years contemporaneous and accurate records of the hours their employees worked, and the wages paid to them (Labor Law §§ 195 [4], 661; Department of Labor Regulations [12 NYCRR] § 142-2.6). The records must show for each employee, among other things, the number of hours worked daily and weekly, the amount of gross wages, deductions from gross wages, and allowances, if any (*id.;* Department of Labor Regulations [12 NYCRR] § 142-2.1 [a]). Employers must keep such records open for inspection by the Commissioner or a designated representative or face issuance of a penalty (Labor Law § 661 and 662 [2]); Department of Labor Regulations [12 NYCRR] § 142-2.1 [e]). In addition, Labor Law § 195 (1) and Department of Labor Regulations (12 NYCRR) § 142-2.7 require employers to furnish employees, when hired, a wage notice showing their pay rates, overtime rates, start dates and scheduled pay day, and with every wage payment, a wage statement (pay stub) listing hours worked, rates paid, gross wages, deductions and net wages. Such records provide proof of proper payment to the employer, employees, and the Commissioner. Employers must keep such records open for inspection by the Commissioner or a designated representative or face a penalty (Labor Law § 661 and 662 [2]). When there is a dispute about whether or how much a worker was actually paid, the Board has repeatedly held that the records an employer must produce include proof of actual payment to the workers, such as canceled checks (*see e.g. Matter of William A. Etter*, Docket No. PR 09-258, at p. 7 [Feb. 14, 2013] ["Petitioner did not supply any canceled checks"]; *Matter of Perry Stuart and Long Island Limousine Service Corp.*, Docket No. PR 11-146, at p. 8 [Dec. 14, 2012] ["neither bank statements nor canceled checks were provided to demonstrate that checks were actually cashed"]; *Matter of Carlos Espinoza and K&P Cleaning Co.*, Docket No. PR 09-339, at p. 3 [Jan. 30, 2012] ["no proof that Claimant ever received the last two paychecks recorded in the payroll journal"]; *Matter of Davinder S. Makan and Makan Land Development-One, LLC*, Docket No. PR 10-081, at pp. 10-11 [Oct. 11, 2011] "[W]ithout canceled checks, Paychex bank statements or similar proof: it is impossible to ascertain whether money shown as withheld from Claimant's wages was ever remitted to the appropriate tax authorities"]; *Matter of RAM Hotels, Inc. (T/A Rodeway Inn)*, Docket No. PR 08-078 at p. 6 ["no evidence that any of the pay reflected on the individual monthly payroll sheets for each employee was actually paid"]).

In the present case, petitioners repeatedly failed to provide requested records to DOL, even after requesting and being granted extensions of time to do so. In an October 15, 2018 letter to petitioners, respondent stated that if Uscana disputed the claim concerning Tacuri, it must "send records to disprove it before October 29, 2018. Records include: payroll records of hours worked and wages paid, or canceled checks." Pitarka's testimony that he "didn't feel like I had to" send such records because he had paid Muñoz Tacuri's separate claim made no sense, nor did his testimony that he "started going" to Farrell who "had all the records," but could not collect "enough information to make a formal submission." According to Pitarka's own testimony, he himself — not Farrell — had and continues to have Uscana's records, many of which are stored in his own

house. In addition to "twenty-some boxes of documents" there, Pitarka testified that other documents, having been emailed from the field to Uscana's office prior to his taking company records home, continue to be "in a computer that's sitting somewhere." Yet as just stated, petitioners never supplied these records (*see Matter of Michael Caruso*, Docket No. PR 11-040, at p.8 [August 7, 2014]). Petitioners failed to produce the required records during the investigation or at the hearing. The records provided were summaries of hours worked by which wages were paid. They were not the actual time keeping records from the worksite, and were not always accurate.

We affirm the $500.00 civil penalty imposed in the order for the violation of Department of Labor Regulations (12 NYCRR) § 142-2.6 requiring employers to maintain and produce required records.

The Order is Affirmed

As discussed below, petitioners did not supply records needed to prove their case at the hearing. This is significant because Labor Law § 196-a provides that when an employer fails to keep adequate records, the employer bears the burden of proving that wages were paid. As stated in *Matter of Mid Hudson Pam Corp. v Hartnett*, (156 AD2d 818, 821 [3d Dept 1989]), "[w]hen an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer" (*see Matter of Baudo v New York State Indus. Bd. of Appeals*, 154 AD3d 535, 536 [1st Dept 2017]; *Matter of Ramirez v Commissioner of Labor of State of N.Y.*, 110 AD3d 901 (2d Dept 2013); *Matter of Mohammed Aldeen and Island Farm Meat Corp. (T/A Al-Noor Live Poultry)*, Docket No. PR 07-093 (May 20, 2009), *affd sub nom. Matter of Aldeen v Industrial Appeals Bd.*, 82 AD3d 1220 (2d Dept 2011); *Matter of Garcia v Heady*, 46 AD3d 1088 (3d Dept 2007). An employer that lacks required records "cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records" (*Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 688-689 [1949].

In the absence of such records, a petitioner bears the burden of proving that disputed wages were paid (Labor Law § 196-a; *Garcia v Heady*, 46 AD3d at 1090; *Angello v National Fin. Corp.*, 1 AD3d at 854). Since they did not keep and furnish legally required records, petitioners had the burden of showing that the order was invalid or unreasonable by a preponderance of the evidence of the specific hours that the claimant worked and what he was paid for those hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*Matter of Joseph Baglio and the Club at Windham, Ltd.*, Docket No. PR 11-394, at p. 7 [December 9, 2015]; *Matter of RAM Hotels, Inc.*, Docket No. PR 08-078, at p. 24). The Board has consistently held that general, conclusory and incomplete testimony is insufficient to satisfy the high burden of precision required to meet an employer's burden of proof in the absence of complete and accurate required records *(Matter of Kehinde O. Adebowale (T/A Saramik Day Care)*, Docket No. PR 17-050, at p. 4 [June 6, 2018]; *Matter of Young Hee Oh A/K/A Young H. Oh, and Cheong Hae Corp. (T/A Cheong Hae Restaurant)*, Docket No. PR 11-017, at p. 12 [May 22, 2014]).

In the present case, the documentary proof offered in evidence by petitioners included summary timesheets for 10 weeks (ending December 17 and 24 in 2017, January 14, 21 and 28, February 4, 11 and 18 , and April 1 and 8 in 2018) prepared by Koniecko, and one (ending May

13, 2018) prepared by Hykaj (who did not testify) and, all reviewed by Domgjoni; stubs of paychecks to Caballon for 13 weeks (ending December 17 and 24 in 2017, and January 14, 21 and 28, February 4, 11, 18, March 4, 18, 25, April 1 and 8 in 2018); and stubs of checks to Orosco and Rodas for the week ending May 13, 2018 which Pitarka testified were generated, but which he acknowledged were never actually paid. Although Pitarka believed he had the records at home, neither timesheets for other weeks, Caballon's check stubs for other weeks, nor any of the sign-in sheets where employees themselves entered their work hours were ever offered. Pitarka was "pretty sure I can get them," but no documents like canceled checks proving actual payment to workers were offered either.

Petitioners base their challenge to respondent's findings concerning Orosco's and Rodas' last week of work on the stubs for the generated but undisputedly never-paid checks, and the May 13, 2018 summary timesheet.[7] Such evidence is insufficient, as it is undisputed that the timesheets, including the one for the week ending May 13, 2018 on which petitioners rely and which was also the basis for the stubs for the generated but never-paid checks, were mere purported, and often inaccurate, summaries of sign-in sheets which petitioners did not offer in evidence. Similarly in *Matter of Donald Merriam and David Paul and Light House Lake Construction, LCC*, Docket No. 16-085, at p. 10 (Sept. 13, 2017), the Board refused to rely on inaccurate summary timesheets where the employer failed to retain and offer in evidence the "white slips" on which drivers had actually recorded their hours worked and what they expected to be paid for.

The unreliability of the summary timesheets, as compared with the underlying sign-in sheets which petitioners failed to offer, is clear from all the evidence. For example, although Pitarka testified he "considered… the time sheets as correct representation of the actual sign-in sheets," he acknowledged "there are always discrepancies" which he himself often had to resolve, and the frequent need to correct the timesheets was confirmed by Koniecko and Domgjoni. While it is possible that as Domgjoni testified, the near-total uniformity of starting times in the timesheets reflects petitioners' recognition that employees should not have their pay docked because they had to wait on line to sign in, the underlying sign-in sheets would have shown whether some employees signed in earlier. As to the critical timesheet for the week ending May 13, 2018 in particular, we note that besides showing Orosco and Rodas working just two days (the fact relied on by petitioners), it shows Tacuri working three days and leaves Caballon and Narvaez out entirely, even though petitioners did not contest the order's findings about those claimants' work that week. Petitioners offered no credible explanation for their failure to offer the sign-in sheets which would have shown actual hours with greater accuracy. Accordingly, they did not meet their burden.

We similarly find that petitioners failed to meet their burden to show that respondent's findings about Caballon's overtime were invalid or unreasonable. His minimum wage/overtime complaint alleged that from November 1, 2017 through May 14, 2018, Caballon worked 45.5 work hours per week but his 5.5 weekly overtime hours were paid at straight time. We find that Caballon was not claiming he worked exactly the same hours every week, but basing his claim on an average for the period. In the absence of required employer records, which would make possible "exactness and precision" (*Anderson*, 328 US at 688-689), Labor Law § 196-a and precedent permit, indeed require the DOL to take the same approach. Petitioners purported to refute Caballon's overtime claim by offering in evidence stubs of paychecks to him for thirteen weeks and noting that these

[7] Since Victor Orosco and Rodas claimed to have worked until May 11 while petitioners ultimately accepted Caballon's and Narvaez's claims to have worked until May 14 and Manuel Tacuri's to have worked until May 17, petitioners were not claiming Uscana closed too soon for Victor Orosco and Rodas to have worked a full last week.

thirteen stubs listed a total of 69.5 overtime hours of which only 28 were not listed as having been paid with an overtime premium. Based on the pay stubs, petitioners argue that Caballon was owed only $350.00 in unpaid overtime premiums for 28 hours, not $1,718.75 for 137.5 hours as reflected in the order to comply.

To refute Caballon's overtime claim, petitioners needed to offer pay stubs or other records for the entire period from November 1, 2017 through May 14, 2018 — not just thirteen weeks chosen for unexplained reasons — as well as to focus on what he was actually paid as shown by canceled checks or comparable records, not just what was recorded in stubs or summary timesheets. Our finding in this regard is buttressed by petitioners' shifting statements regarding Caballon's, and indeed all employees', overtime. Both Pitarka and Domgjoni implied that Uscana employees all worked, and were properly paid for, far more than 5.5 weekly overtime hours; indeed, that is why Pitarka stated he was initially suspicious of Caballon's overtime claim. According to Domgjoni, eight hours' weekly overtime was "the minimum," with another six or seven hours common and twenty to thirty "very easily" reached. Domgjoni also acknowledged that Caballon complained about unpaid overtime in March 2018, though Domgjoni believed the complaint was about that month only. Pitarka, too, testified Caballon complained and "my understanding was that he was going to get paid the next payment cycle." Although Domgjoni's general testimony was that complaints were always promptly addressed, petitioners submitted no specific evidence concerning Caballon's complaint, much less that it was corrected. In light of petitioners' failure to supply a full set of records of Caballon's hours and how much he was actually paid for the entire relevant period, we find Petitioners' argument that Caballon's overtime entitlement must be reduced based on a narrow, unexplained selection of records insufficient to meet their burden.

The Civil Penalty is Affirmed

Besides the $500.00 penalty for record-keeping violations already discussed, the order includes a 50% civil penalty of the underpayment found in the order. Labor Law§ 218 (1) provides that when determining an amount of civil penalty to assess against an employer who has violated a provision of Article 19 of the Labor Law, respondent shall give:

> "due consideration to the size of the employer's business, the good faith basis of the employer to believe that its conduct was in compliance with the law, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with record-keeping or other non-wage requirements."

Garcia testified that she recommended a 50% civil penalty in the order based on the employers' size, good faith, and the gravity of violations. Petitioners did not introduce any credible evidence to challenge the civil penalty. We affirm the civil penalty in the order (Labor Law § 101 [2]).

Liquidated Damages

Labor Law § 218 provides that when wages are found to be due, respondent shall assess against the employer the full amount of the underpayment or unpaid wages and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its

underpayment or nonpayment of wages was in compliance with the law. Here, respondent correctly determined that the claimants were not paid all wages, and petitioners failed to prove a good faith basis for believing that its underpayment was in compliance with the law. As such we affirm the liquidated damages in the order. (Labor Law § 101 [2]).

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment of those wages shall include "interest at the rate of interest then in effect as prescribed by the superintendent of financial services pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment." Banking Law § 14-a sets the "maximum rate of interest" at "sixteen per centum per annum." Here, respondent correctly determined that the claimants were not paid all wages owed and petitioners did not offer any credible evidence to challenge the imposition of interest. As such, we affirm the interest in the order. (Labor Law § 101 [2]).

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The order is affirmed; and

2. The petition for review be, and the same is, denied.

Dated and signed by the Members
of the Industrial Board of Appeals
on June 24, 2020.

Molly Doherty, Chairperson
New York, New York

Michael A. Arcuri, Member
Utica, New York

Gloribelle J. Perez, Member
New York, New York

Patricia Kakalec, Member
Brooklyn, New York

Najah Farley, Member
Brooklyn, New York